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IN THE
COURT OF APPEALS OF INDIANA

WALTER BAKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0605-CR-239
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0506-FA-29

May 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Walter Baker appeals his conviction and sentence for child molesting as a class C felony. We affirm.

Issues

Baker presents three issues, which we restate as the following four:

I. Whether the trial court committed reversible error by communicating with the jury outside the presence of the parties;

II. Whether there was sufficient evidence to sustain his conviction;

III. Whether the trial court improperly weighed the aggravating and mitigating circumstances at sentencing; and

IV. Whether the sentence was inappropriate in light of the nature of the offense and Baker's character.

Facts and Procedural History

In the spring of 2005, V.S., then nine years old, and her family were members of a Merrillville church. They attended church services and related activities several times a week. Baker, age forty-eight, was a member and trustee of the church and participated in several church ministries, including Boy Scouts and Kids Club. On the afternoon of April 10, 2005, V.S. entered the church basement while looking for her brother. Baker was in the basement and asked V.S. to come over to him. He raised her clothing and placed his hands on her bare chest and inside her underwear. He placed four fingers near or inside her vagina and "wiggled" them, causing her to feel "terrible" and experience pain. Tr. at 71. He continued to touch and hold her although she asked him to stop. "[A]fter he was done[,]" he let go of V.S., and she ran upstairs. *Id*. at 72.

On June 13, 2005, the State charged Baker with two counts of child molesting, one as a class A felony and one as a class C felony. On January 20, 2006, a jury acquitted Baker on the class A felony charge and convicted him of class C felony child molesting, which carries a fixed term of two to eight years, with an advisory sentence of four years. *See* Ind. Code § 35-50-2-6. On March 10, 2006, the trial court sentenced Baker to seven years. Baker now appeals.

Discussion and Decision

I. Ex Parte Communications

During its deliberations, the jury sent five written requests for information via the bailiff to the trial court. The court consulted the parties prior to responding to Question One. The court responded to the jury's Questions Two, Three, and Four without consulting the parties. Upon receiving Question Five, the trial court met with the parties and agreed to refer the jury to three specific jury instructions, but the trial court mistakenly identified instructions 5, 8, and 25, instead of the agreed-upon instructions of 7, 8, and 25.

Responding to a written communication from the jury implicates both common law and statutory protections. *Dickenson v. State*, 835 N.E.2d 542, 550 (Ind. Ct. App. 2005), *trans. denied*. Here, Baker alleges a violation of his common law protections under the Sixth Amendment to the United States Constitution, which guarantees a defendant the right to be present at all critical stages of a criminal proceeding.[1] Baker claims that the trial court

[1] Baker also alleges that the court violated his rights under Article 1, Section 13 of the Indiana Constitution, but he fails to present a separate and distinct analysis to support this claim. Therefore, his state constitutional argument is waived. *See Teeters v. State*, 817 N.E.2d 275, 278 n.2 (Ind. Ct. App. 2002) (holding that state constitutional claim is waived where appellant presented no separate analysis other than to say that the Indiana Constitution cannot be more restrictive than U.S. Constitution), *trans. denied*.

committed reversible error when it responded to Questions Three and Four in his absence and when it did not accurately communicate the parties' agreed-upon answer to Question Five.

On several occasions, our supreme court has instructed trial courts on the proper procedure when a deliberating jury requests additional guidance. The trial court should:

> notify the parties so they may be present in court and informed of the court's proposed response to the jury *before* the judge ever communicates with the jury. When this procedure is not followed, it is an *ex parte* communication and such communications between the judge and the jury without informing the defendant are forbidden. However, although an *ex parte* communication creates a presumption of error, such presumption is rebuttable and does not constitute *per se* grounds for reversal. When a trial judge responds to the jury's request by denying it, any inference of prejudice is rebutted and any error deemed harmless.

Bouye v. State, 699 N.E.2d 620, 627 (Ind. 1998) (citations and quotation marks omitted) (emphases in original); *see also Stephenson v. State*, 742 N.E.2d 463, 492 (Ind. 2001) (quoting *Pendergrass v. State*, 702 N.E.2d 716, 719-20 (Ind. 1998)), *cert. denied*.

The State concedes that the trial court erred by communicating with the jury without first consulting Baker.[2] It argues that the errors were harmless, however, because the trial

[2] In fact, during the sentencing hearing, the trial court stated:

court essentially denied the jury's requests for additional information, thus rebutting any inference of prejudice. *See, e.g.*, *Dickenson*, 835 N.E.2d at 551 (where trial judge denied requests from deliberating jury for videotape transcript, testimony transcript, and a legal definition, any error was harmless); *see also Stephenson*, 742 N.E.2d at 492 (ex parte communication was harmless error where court denied jury's request to listen to defendant's taped statement for a second time and to review depositions already read into evidence).

In responding to Questions Three and Four, the trial court did not provide the jury with any additional information. Question Three reads as follows: "Can we acquit on one count, find guilty on second count, and still convict on battery on first count? Or would the guilty verdict on second count include the battery and make the consideration of battery on first count unnecessary?" Jury R. at 30.[3] The trial court informed the jury that "they must refer to the instructions." Tr. at 499. While the other responses to jury questions were

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> I want the Court of Appeals to recognize that I also realize that I committed error by communicating with the … jury three times during the course of their deliberations without notifying counsel. But I believe that in communicating with the jury I did not give the jury any information that they did not already have before them. In fact, each one of those—in each of those communications although an error on my part, I informed them that they are to use their individual recollection recalling the evidence. I did not feed them anymore information. I did not add—in my opinion only—to any information that they did not already possess. I know that I was in error in doing so. In fact, out of the five communications total, two of which I did consult with the attorneys, three of which I clearly did not. So, it was error on my part and I apologize to you, Mr. Baker, for communicating at all. It was wrong on my part to do so. I thought that I was expediting the process, but in—but in expediting the process and answering their question, although not giving them anymore information, I erred.
>
> I urge the Court of Appeals to find that this error is harmless and to preserve this jury trial conviction, given this explanation and how this communication took place.

Sent. Tr. at 14-15.

[3] "Jury R." refers to the record volume entitled Jury Trial Juror Questions, Jury Deliberation Questions and Court Responses.

presented in writing, the court instructed the bailiff to deliver this response verbally. With regard to Question Three, Baker apparently relies upon the presumption of error, with no further argument. At trial, defense counsel objected to the trial court's response, stating, "I would have requested that you say to them at that point in time that you must refer to the instructions for your guide in terms of how to answer to that question." Tr. at 498. After learning that the trial court did in fact tell the jury that it must refer to the instructions, defense counsel then objected to the trial court's process of conveying that response verbally through the bailiff rather than in writing. On appeal, however, Baker does not raise this issue. Thus, it is waived.

Question Four reads as follows: "May we see all of the State's and Defense's Exhibits?" *Id*. at 31. The jurors apparently did not realize that they already had all of these exhibits in the jury room. The court's response was: "During the course of the trial, you have received all of the evidence that you may consider in your deliberations. That information/evidence has been provided to you." *Id*. at 36.

Baker argues that this response resulted in unfair prejudice because the court failed to advise the jury that the exhibits were in their possession and that the jury "did not have the benefit of reviewing them before reaching their result." Appellant's Br. at 10. We think that the trial court did inform the jury that the requested exhibits were in the jury room when it stated, "That information/evidence has been provided to you." While the trial court erred in communicating with the jury outside Baker's presence, the State has successfully rebutted the presumption of prejudice. There is no dispute that the exhibits were in the jury room, available for review during deliberations, and the trial court did not provide any additional

information to the jury in response to its question on this topic. The error was therefore harmless, and Baker's argument must fail.

Question Five repeated the exact language of Question Three, with the addition of the following: "The members of the jury have different interpretations of the instructions. If at all possible please answer the above question." Jury R. at 32. Again, Baker does not present a separate argument regarding the trial court's response to Question Five, seeming to rely on the rebuttable presumption of prejudice. We note, however, that the trial court consulted the parties before responding to Question Five. Thus, the court's communication with the jury regarding Question Five did not violate Baker's right to be present at critical stages of the criminal proceeding, and his ex parte communication argument fails.[4]

In sum, the State has successfully rebutted the presumption of prejudice regarding the ex parte communications challenged by Baker. Any errors were harmless.

II. Sufficiency of the Evidence

Baker also contends that the evidence was insufficient to support his conviction. When we review a sufficiency challenge, we neither reweigh the evidence nor judge the credibility of the witnesses. *Wright v. State*, 828 N.E.2d 904, 905-06 (Ind. 2005). We consider only the evidence favorable to the verdict and all inferences reasonably drawn therefrom. *Nuerge v. State*, 677 N.E.2d 1043, 1048 (Ind. Ct. App. 1997), *trans. denied*. We

[4] The parties agreed to refer the jury to instructions 7, 8, and 25. The trial court inadvertently advised the jury to consult instructions *5*, 8, and 25, however. In our view, however, this scrivener's error was harmless. As the State points out, the trial court had intended to refer the jury to review instruction 7, which related to class A felony child molest. By mistake, the court referred the jury to instruction 5, which dealt with the lesser included charge of battery as a class A misdemeanor. The trial court's mistake actually emphasized a lesser charge, and the jury acquitted Baker on the class A felony charge. The error was therefore harmless.

will affirm the conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Wright*, 828 N.E.2d at 906.

Specifically, Baker argues that the State failed to prove one element of class C felony child molesting—that he intended to arouse or satisfy his or V.S.'s sexual desires. *See* Ind. Code § 35-42-4-3(b). V.S. testified that Baker touched her bare chest and near or inside her vagina. She said that he "wiggled" his fingers inside her underwear. Tr. at 70. "[T]he intent to arouse or satisfy sexual desires may be inferred from evidence that the accused intentionally touched a child's genitals." *Lockhart v. State*, 671 N.E.2d 893, 903 (Ind. Ct. App. 1996). Considering V.S.'s testimony and the reasonable inferences arising therefrom, we conclude that a reasonable trier of fact could have found beyond a reasonable doubt that Baker intended to arouse or satisfy his sexual desires. *See e.g. Kirk v. State*, 797 N.E.2d 837, 841 (Ind. Ct. App. 2003) (evidence that defendant rubbed child victim's leg and touched her vagina supported an inference that he acted to arouse or satisfy his sexual desires), *trans. denied* (2004); *Wise v. State*, 763 N.E.2d 472, 475 (Ind. Ct. App. 2002) (finding intent to arouse or satisfy sexual desires where defendant touched a child's vagina as she slept).

Baker argues that V.S.'s testimony lacks "probative quality[.]" Appellant's Br. at 13. He suggests that Baker could not have touched V.S. as she described because she was wearing a t-shirt, a long-sleeved garment, tights, and underwear. Baker is clearly inviting us to reweigh the evidence and judge V.S.'s credibility, which we simply cannot do. *See G.N. v. State*, 833 N.E.2d 1071, 1076 (Ind. Ct. App. 2005).

III. Aggravators and Mitigators

The trial court sentenced Baker to seven years, a term within the statutory sentencing range but longer than the advisory sentence of four years. *See* Ind. Code § 35-50-2-6. Baker argues that the trial court erred by failing to assign significant weight to the fact that he offered to enter into a plea agreement prior to trial, an offer which V.S.'s family urged the State to reject.

> The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. However, the trial court may not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.

Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005) (citations and quotation marks omitted), *trans. denied* (2006). We afford great deference to the trial court's sentencing decision and will set it aside only for an abuse of discretion. *Burrus v. State*, 763 N.E.2d 469, 471 (Ind. Ct. App. 2002), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.*

At the sentencing hearing and in its written sentencing order, the trial court stated that it had found one significant aggravator, which was Baker's prior felony sodomy conviction from 1992. According to the presentence investigation report, Baker was a registered sex

offender for life because his sodomy victim was under twelve years of age. PSI at 4.[5] The court, while acknowledging that this prior offense was somewhat remote, assigned "a lot of weight" to it because it was another sex crime.[6] Sent. Tr. at 11. The trial court also stated that it had found no significant mitigators but that it would "take into account" Baker's offer to plead guilty to class A felony child molesting. Sent. Tr. at 12.[7]

Baker argues that "the fact that the trial court does not mention Baker's desire to spare [V.S.] a trial indicates the trial court overlooked this [mitigator] in imposing the sentence." Appellant's Br. at 16. We disagree. At the hearing, Baker's counsel argued that Baker had offered to plead guilty "to avoid putting any of these victims through a trial." Sent. Tr. at 5-6. Defense counsel also stated that Baker did "quite a bit of good" for the church where the molestation occurred and that he was attempting to "amend his ways."[8] *Id*. at 5. As stated above, the trial court was not obligated to accept Baker's argument as to what constitutes a mitigating factor, nor was it required to explain why it did not assign significant mitigating weight to certain factors. After considering all the evidence presented at sentencing, the trial court determined that the aggravating factor of Baker's criminal history "outweighs any mitigation that I could possibly find in you or about you." *Id*. at 12. We find no abuse of

[5] The presentence investigation report is contained in its own volume separate from the appendix.

[6] At the sentencing hearing, the trial court expressed its uncertainty as to whether the 1992 conviction was committed against a child. The presentence investigation report clearly states that the victim was under the age of twelve.

[7] "Sent. Tr." refers to the separate volume entitled Record of Sentencing Hearing Proceedings.

[8] We find this particular argument for mitigation somewhat disingenuous, considering that Baker involved himself in children's ministries and clearly used his role at the church as the means to gain access to and molest V.S.

discretion in that conclusion.

IV. Rule 7(B) Review

Finally, Baker asks us to revise his sentence pursuant to our authority under Indiana Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." He fails to provide a separate and distinct argument for this claim, however, so it is waived for review.

Waiver notwithstanding, we cannot conclude that Baker's sentence is inappropriate. This conviction was his second sex-related offense, and it was committed in the young victim's church. Baker has presented nothing about his character to persuade us that his seven-year sentence was inappropriate.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.